Federal Communications Commission
Washington, D.C. 20554

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DA 05-3093
In Reply Refer to:
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Re: WKHY(FM), Lafayette, IN
Facility ID No. 63185
File No. BALH-20050502ABY

WXXB(FM), Delphi, IN
Facility ID No. 72676
File No. BALH-20050502ABZ

Applications for Assignment of Licenses

Dear Counsel:

We have before us the above-captioned applications ("Assignment Applications") proposing to assign the licenses of WKHY(FM), Lafayette, Indiana, and WXXB(FM), Delphi, Indiana, from Stay Tuned Broadcasting, Corp. ("Stay Tuned") to WASK, Inc., a subsidiary of Schurz Communications, Inc. ("Schurz"). On June 6, 2005, Artistic Media Partners, Inc. ("AMP"), licensee of Indiana stations WLAS(AM) and WAZY-FM, Lafayette, WLFF(FM), Attica, and WSHP(FM), Brookston, filed a Petition to Dismiss or Deny ("Petition to Deny") the Assignment Applications.[1] AMP argues that grant of these assignments would result in Schurz having undue concentration of ownership in the Lafayette, Indiana, radio market. For the reasons stated below, we deny the Petition to Deny and grant the Assignment Applications.

[1] Schurz and Stay Tuned filed separate Oppositions on June 20, 2005, and AMP filed a Reply on July 7, 2005.

BACKGROUND

Under the local radio ownership rule now in effect,[2] Arbitron's Lafayette Metro Survey Area ("Lafayette Metro") is the relevant geographic market for evaluating the Assignment Applications' compliance with the numerical limits set forth in Section 73.3555(a) of the Commission's rules.[3] AMP urges the Commission to abandon the numerical limits and evaluate this transaction using a "case-by-case" approach that focuses on ad revenue shares in the Metro. Based primarily on its assertion that Schurz's post-transaction revenue share would rise from 32.6 percent to 52.2 percent,[4] AMP argues that denial of the Assignment Applications is necessary to preserve competition in the Metro. AMP adds that this increase "has a dramatic impact upon the Herfindahl-Hirschman Index ("HHI")," which the Department of Justice ("DOJ") utilizes in interpreting market data, further asserting that consummation of the Assignment Applications would increase the HHI in the Lafayette Metro from 2,222 to 3,055 points.[5] AMP notes that the proposed transaction does not comply with the 1992 DOJ guidelines for horizontal mergers,[6] asserting that "DOJ has sought to limit the percentage of advertising revenue controlled by one corporation to *less than* forty percent (40%) of the market's total advertising revenue."[7] According to AMP, "[t]he Commission's numerical limits system recently came under attack in the [*Prometheus Remand Order*]."[8] In that case, AMP claims, "the relevance of DOJ antitrust law and HHI figures in the analysis of broadcast market structure and power was argued."[9]

Stay Tuned's Opposition cites several cases where, under the Interim Policy then in effect,[10] the Commission examined proposed assignments or transfers that would result in post-merger ad revenue shares above 52.2 percent, yet found such transactions consistent with the public interest.[11] Schurz's Opposition states that the Commission has previously observed that the HHI is but one of several screening devices used

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[2] *See 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules*, 18 FCC Rcd 13620, 13724-37 (2003) ("*Ownership Order*"), *aff'd in part and remanded in part*, *Prometheus Radio Project, et al. v. F.C.C.*, 373 F.3d 372 (3d Cir. 2004) ("*Prometheus Remand Order*"), *cert. denied,* 125 S. Ct. 2902, 2903, 2904 (2005). *See also Prometheus Radio Project, et al. v. F.C.C.*, No. 03-3388 (3d Cir. Sept. 3, 2003) (granting motion for stay of effective date of new rules), *stay modified on reh'g*, No. 03-3388 (3d Cir. Sept. 3, 2004) ("*Prometheus Rehearing Order*").

[3] 47 C.F.R. § 73.3555(a).

[4] Petition to Deny at 4.

[5] *Id.* at 4-5.

[6] *Id*. at 5 (citing U.S. Department of Justice *Horizontal Merger Guidelines*, § 1.5 (1992)).

[7] *Id.* at 11 (emphasis in original). AMP also cites several cases where DOJ has authorized mergers only after a company agreed to divest stations in order to reduce its ad revenue share. *Id.* at 11-12.

[8] *See supra* note 2.

[9] Petition to Deny at 7.

[10] *See Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets ("Local Radio Ownership NPRM")*, 16 FCC Rcd 19861, 19894-97 (2001). *See also Shareholders of AMFM, Inc.,* 15 FCC Rcd 16062 (2000).

[11] Stay Tuned Opposition at 3, note 4 (citing *Nassau Broadcasting II, LLC, and Millennium Shore License Holdco, LLC*, 17 FCC Rcd 9001 (2002) (approving transaction that would result in proposed assignee controlling 63.8 percent of ad revenues) and *Solar Broadcasting and Clear Channel Broadcasting Licenses, Inc.* ("*Solar Broadcasting*"), 17 FCC Rcd 5467, 5478 (2002) (approving transaction that would result in proposed assignee controlling 52.8 percent of ad revenues)).

by DOJ, noting that an HHI above a certain level does not necessarily imply adverse competitive consequences in a local radio market.[12]

DISCUSSION

When it adopted its bright-line, geography-based radio rule for rated markets, the Commission concluded that "[b]y applying the numerical limits of the local radio ownership rule to a more rational market definition, we believe that, *in virtually all cases*, the rule will protect against excessive concentration levels in local radio markets that might otherwise threaten the public interest."[13] The Commission acknowledged that it must give a hard look to petitions that allege that a particular transaction is not in the public interest notwithstanding compliance with the new rule, and noted the standard for such petitions.[14] Specifically, a petition "must contain specific allegations of fact sufficient to show that (1) the petitioner is a party in interest, (2) a grant of the application would be *prima facie* inconsistent with the public interest, and (3) a substantial and material question is presented to be determined by the Commission."[15] Although we agree Petitioner is a party in interest, we find that Petitioner's challenge ultimately fails under this standard and that departure from the rule is unwarranted in this case.

In urging a case-by-case approach, AMP is asking us to conduct an analysis that the Commission expressly rejected in adopting the new radio rule. Concerned about "the harm caused by a lack of regulatory certainty" with case-by-case review, the Commission concluded, based on its "experience administering structural ownership," that "the adoption of bright line rules" was preferable in implementing the Commission's competition and other goals.[16] With regard to incorporation of the existing numerical limits into the new radio rule, AMP's statement that such a "system" recently "came under attack" in judicial review of the *Ownership Order* before the Third Circuit Court of Appeals is inexcusably misleading to the extent it suggests that the Court took issue with such a system in principle. The Court took a completely opposite view and "accept[ed] the Commission's rationale for employing numerical limits (as opposed to other regulatory approaches *such as a case-by-case analysis*) . . . ."[17] The Court went even further, endorsing the Commission's decision to continue a numerical limits approach as being "*in the public interest*."[18] Pending the outcome of the remand proceeding, the Commission continues to apply the numerical limits of Section 73.3555(a).[19]

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[12] Schurz Opposition at 8 (citations omitted).

[13] *Ownership Order,* 18 FCC Rcd at 13813 (emphasis added).

[14] *See id.* at 13647.

[15] *Id.* at 13647, n.131 (citing 47 U.S.C. § 309(d) and case precedent (case citations omitted)).

[16] *Id.* at 13646-47.

[17] *Prometheus Remand Order*, 373 F.3d at 431 (emphasis added).

[18] *Id.* (emphasis added). To the extent Petitioner is merely observing that parties to the judicial appeal lodged complaints against a numerical limits system in principle, such observation is, of course, irrelevant to the outcome of this case, as is Petitioner's assertion that the relevance of DOJ antitrust law and HHI figures "was argued" in that appeal.

[19] As the Court observed (*see id.* at 430), the existing numerical ownership limits were established by Congress in the 1996 Telecommunications Act and were subsequently incorporated into Section 73.3555(a). *See Telecommunications Act of 1996*, Pub. L. No. 104-104, 110 Stat. 56 (1996); *Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996*, 11 FCC Rcd 12368 (1996).

Even were we to agree to attempt a case-by-case approach in this case, AMP has failed to proffer sufficient economic data to permit meaningful economic analysis or substantiate its claim of competitive harm. In particular we note that the Commission has concluded that ad revenue share is of "decreasing relevance . . . as a barometer of competition."[20] Moreover, AMP does not cite a single case in which the Commission found ad revenue share and HHI data of the type relied on here to be dispositive in determining whether a market will be unduly concentrated following a proposed transaction.

Furthermore, as the Commission observed in the *Ownership Order*, "[p]reserving competition for listeners is of paramount concern" in our public interest analysis.[21] The Commission stated that the numerical limits approach is designed to promote competition by assuring that a sufficient number of rivals are actively engaged in competition for listening audiences.[22] In the instant case, according to BIA data, nine station owners will remain in the Lafayette Metro post-transaction. Contrary to AMP's contentions, we find no evidence to suggest that this is an insufficient number to preserve competition in the Metro.

In light of the above, we are unpersuaded that the new radio ownership rule is inadequate to protect against competitive harm. Accordingly, we analyze this transaction by applying the numerical limits of Section 73.3555(a), using the Lafayette Metro as the relevant geographic market. BIA lists 17 commercial and noncommercial educational radio stations as "home" to the Lafayette Metro. Schurz currently owns three stations in the Metro – WASK-FM, WKOA(FM) and WYXL(FM). Through its acquisition of Stay Tuned's two stations, Schurz would own one AM and four FM stations in the Metro, which complies with the local radio ownership rule.[23]

Based on the evidence presented in the record and available through the BIA database, we find that AMP has not raised a substantial and material question of fact warranting further inquiry. We further find that WASK, Inc. is qualified as the assignee and that grant of the Assignment Applications is consistent with the public interest, convenience and necessity. Accordingly, IT IS ORDERED, that Artistic Media Partners, Inc.'s June 6, 2005, Petition to Dimiss or Deny IS DENIED, and that the applications to assign the licenses of stations WKHY(FM), Lafayete, Indiana (File No. BALH-20050502ABY) and WXXB(FM), Delphi, Indiana (File No. BALH-20050502ABZ) from Stay Tuned Broadcasting, Corp. to WASK, Inc. ARE GRANTED.

Sincerely,

Peter H. Doyle,
Chief, Audio Division
Media Bureau

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[20] *Ownership Order,* 18 FCC Rcd at 13642.

[21] *Id.* at 13716. *See also id.* at 13641.

[22] *See id.* at 13716.

[23] *See* 47 C.F.R. § 73.3555(a)(1)(iii) (in a radio market with between 15 and 29 full-power, commercial and noncommercial radio stations, one owner may hold up to six commercial stations, no more than four of which are in the same service).